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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 661

SPECTOR MOTOR SERVICE, INC., Petitioner,

v.

OTTO F. MESSNER, Secretary of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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The petition states that the questions presented are as follows:

"(1) In administering a state statute purporting to levy a 'gross receipts tax' on interstate motor carriers, based on the proportion that the 'number of miles of routes operated in this Commonwealth' bears to the 'total number of miles of all routes operated', can a state administrative agency abandon that constitutionally objectionable formula and exact from an exclusively interstate motor carrier a 'gross receipts tax' based, not on the above formula provided in the statute, but on its own administra-

tively-created formula based on the proportion the 'number of miles that was traveled within Pennsylvania' bears to the 'total number of miles traveled interstate'?

"(2) Assuming that such a tax can constitutionally be assessed by the state administrative agency, can the tax base constitutionally include mileage traveled on a toll road, for all of which mileage the exclusively interstate carrier pays tolls into a fund out of which all costs of every kind incurred by the State and its agencies have already been, or will be, paid?"

The answer of these respondents to the second question is given in the Statement Opposing Jurisdiction pages 1-9, and again in "APPELLEES' REPLY TO APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM", pages 12-15, both of which were filed in *Interstate Motor Freight System, Inc. v. Otto F. Messner et al.* at No. 606 October Term, 1953. This Court denied the petition for certiorari in No. 606 on April 12, 1954.

This brief will, therefore, be devoted to the first question, with reference to the other briefs just cited for the second question.

The argument of appellant that the Commonwealth is charging a carrier for the use of its highways upon the basis of the length of the physical route, and not upon the basis of miles traveled on such route, is unsound.

Petitioner's attempt to construe Section 2 as imposing a tax upon the physical extent of routes rather than upon the number of miles traveled on such routes, was rejected by the Supreme Court of Pennsylvania in its opinion as follows:

> "* * * Such a construction is unwarranted. The title of the Act provides: 'Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire.' Use of the highways can be ascertained only from the number of miles operated, not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in administering the tax, that is, that the tax is based upon the number of miles operated, not the physical location and the extent of the routes. Cf. Commonwealth v. Brinks, Incorporated, 346 Pa. 296, 30 A. 2d 128." (375 Pa. p. 455)

Petitioner offered no proof whatever that the Legislature or the administrative officials or the courts of Pennsylvania, in construing this tax statute, intended in any way to avoid the commerce clause or any other constitutional provision. Interpretation of the statute by the Supreme Court of Pennsylvania, we submit, should, therefore, be accepted as conclusive.

The title of the Act of June 22, 1931, P. L. 694, 72 P. S. 2183, is as follows:

> "Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire."

It will be noted that the tax is imposed "on the *use* of the public highways".

The intent so declared is to impose the tax not on routes as such, but on the *use,* and use is measured by miles traveled.

Likewise, the title speaks of "owners or operators of motor vehicles *transporting",* not merely those having licenses for routes.

Section 2 of the Act of June 22, 1931, P. L. 694, 72 P. S. 2184, provides that the motor carrier shall file a report containing:

> "* * * (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; * * *"

This language shows clearly that the Department of Revenue is to get in this report the number of miles operated, not merely the physical length of each *route.*

The words "during the period for which the report is filed" also indicate that the report is to contain the total number of miles operated throughout the period.

The length of the routes would ordinarily remain constant during such period.

All of these requirements are in exact compliance with the provision at the beginning of Section 2 that "Each company shall pay an excise tax for the use of the highways of this Commonwealth. * * *".

The tax is imposed on miles operated, not on routes or according to the physical length of the respective routes.

(1) Section 2, at the beginning, expressly declares that each company shall pay a tax "for the use of the highway". The use of highways is measured by the number of miles operated or traveled. The length of a particular route would not indicate the amount of *use* thereof.

(2) The key word in defining the measure of the tax is *"miles"*, not "routes". The tax is imposed, not on "routes operated" but on *"miles* of routes *operated"*. The phrase means the number of *miles operated on or over routes*. This is the fair and reasonable construction.

The act does not say "the *length* of its line in this State", as in *Canton Railroad Co. v. Rogan*, 340 U. S. 511, 516 (1951).

In *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 547 (1950), Mr. Justice Black speaks of:

> "* * * such key factor as mileage * * *"

(p. 547)

This Court has also said that the purpose:

> "* * * may be indicated by the nature of the imposition, such as a mileage tax directly propor-

tioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245, * * *". (Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 186 (1931)

(3) That the tax is not based upon routes operated, but upon miles operated, was ruled by this court in:

Commonwealth v. Brink's, Inc., 346 Pa. 296, 301 (1943)

In this case the company objected that it did not operate over any *route,* and, therefore, was not a carrier within the Act of 1931.

This objection was overruled. In the opinion Mr. Justice Drew said:

"* * * Appellant next resorts to the argument that it does not operate on schedules or over fixed *routes* and is not, therefore, within the class of carriers subject to the tax. Section 2 of the Act admittedly requires *a report of routes* and schedules if there are any, but *this requirement is obviously one imposed for the express purpose of facilitating proper administration of the act and eliminating tax evasion.* It does not mean that where there are none the carrier is not within the plain language of the statute. * * *" (Emphasis supplied) (p. 301)

Section 4 of the Act of 1931 further provides:

"Section 4. The said excise tax on gross receipts shall be settled, resettled, and otherwise imposed and adjusted in the same manner, within the same periods of time, and subject to the same penalties, interest, and right of resettlement, review, appeal, and refund, *as provided by law in the case of*

taxes on gross receipts." (695-696) (Emphasis supplied)

Before 1886 Judge McPherson in the Court of Common Pleas of Dauphin County, Pennsylvania, had established the practice of apportioning gross receipts of railroads according to the ratio of miles traveled in Pennsylvania to total miles traveled. His decision was affirmed by the Supreme Court of Pennsylvania in *Commonwealth v. Lehigh Valley Railroad Company,* 1 Mona. 45 (1888), and again affirmed by the Supreme Court of the United States in *Lehigh Valley Railroad Company v. Pennsylvania,* 145 U. S. 192 (1892).

These decisions definitely approved the apportionment of gross receipts according to the ratio of miles traveled in Pennsylvania to total miles traveled.

This practice was the method of "settlement * * * as provided by law in the case of taxes on gross receipts." The employment of miles traveled in the ratio provides a fair measure of the use of the highway.

The Pennsylvania Department of Revenue has adopted this construction in making assessment of tax under this statute. Since the enactment of the statute in 1931, the practice of the Pennsylvania Department of Revenue has been to apportion gross receipts according to miles traveled, not length of routes.

The form of gross receipts tax report for operators of motor vehicles for hire, under the heading "Computation of Tax By Taxpayer" requires the following data to be furnished:

"6. Interstate Operations

"a. The number of miles that was traveled within Pennsylvania ..... Miles.

"b. Total number of miles traveled Interstate, that is on trips partly inside and partly outside Pennsylvania ..... Miles.

"c. Total Gross Receipts from Interstate operations, that is, from the entire mileage shown in 6b $.....

"Less Gross Receipts received for carrying United States mail on interstate trips * * *"

The operator is not required to state the length of physical routes, whether operated or not. The only figures which he is required to furnish, and which the Department has before it when it makes an assessment, are "miles operated."

Section 3 provides that the tax shall be paid:

"* * * (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such route lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of

all routes operated by such company during said period. * * *" (72 P. S. 2185)

In (2) as in (1), it is not routes but miles operated, we submit, which determines the numerator and the denominator of the ratio.

Here, as stated in Section 4 quoted *supra*, the Act of 1931 expressly provides the method of *apportionment* which has been approved by the Supreme Court of Pennsylvania and the Supreme Court of the United States.

Even if the intent were doubtful because of the use of the word "routes", such doubt is clearly removed by—

(a) The words in the title: "imposing a tax on gross receipts as an excise on the use of the public highways";

(b) The direction in Section 4 quoted supra that the tax: "be settled * * * as provided by law in the case of Taxes on Gross Receipts";

(c) The practice of the Pennsylvania Department of Revenue, applied uniformly since 1931, in apportioning gross receipts according to miles travelled, not length of routes.

In *Central Greyhound Lines v. Mealey*, 334 U. S. 653 (1948), a common carrier by motor vehicle operated buses from New York City to Buffalo, over a route, 42.53 percent of which was in New Jersey and Pennsylvania.

The Supreme Court held that New York could tax at two per cent the gross receipts from the transportation over this route, apportioned according to the mile-

age in New York. The portion was the fraction in which the mileage traveled in New York was the numerator and the total mileage was the denominator.

Mr. Justice Frankfurter said:

> "* * * On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State. * * *"

The court also referred to its earlier decision in *Lehigh Valley Railroad Co. v. Commonwealth,* 145 U. S. 192 (1892) in which the Supreme Court of the United States affirmed the decision of the Supreme Court of Pennsylvania, reported in 1 Mona. 45 (1888), and said:

> "* * * The trial court had found, as appears from the record, that the 'total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination were apportioned between the companies upon a mileage basis — that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried' * * *"

Petitioner has not produced any figures to prove that even a formula based entirely upon length of routes would *in fact* injure petitioner or discriminate against it or result in a higher tax than if the assessment were based on miles traveled, or would impose an unreasonable burden on interstate commerce. Petitioner's assertion of

unfairness in apportionment according to routes, rather than miles, does not prove itself.

Petitioner's complaint in equity averred merely

> "5. Plaintiff operates over routes traversing several states, including Pennsylvania, part of said routes in Pennsylvania being over the Pennsylvania Turnpike and its extension"

Petitioner nowhere specifies whether the part of the route or mileage over the Pennsylvania Turnpike would amount to 500 miles or 50,000 miles. In fact, some carriers do enter the Turnpike at Somerset, Pennsylvania and leave it at Bedford, Pennsylvania, after running about 30 miles, in order to avoid the haul over the Allegheny Mountain.

Nor does petitioner specify the number of routes which it travels. A trucking company doing exclusively interstate business as petitioner does, may follow a single route—often the Turnpike—uninterruptedly and invariedly, and would have to report only the length of this one route and would show abnormally small numerator and pay less tax than a carrier which was assessed according to the number of *miles* traveled.

This Court has sustained a statute in which the proceeds of interstate transportation were apportioned according to *length of line or route.*

In *Canton Railroad Co. v. Rogan,* 340 U. S. 511 (1951), a Maryland statute imposed a tax upon motor carriers

> "* * * 'upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line.' " (516, note)

The Supreme Court held that this tax was not in violation of the commerce clause.

Mr. Justice Douglas said:

> "* * * It is settled that a non-discriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state (see Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255) and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to the mileage within the state is an approved method. Greyhound Lines v. Mealey, 334 U. S. 653, 663." (515-516)

This tax was upheld although the carrier was not using public highways owned by the state, but was operating on a roadbed which the railroad company had provided at its own expense and owned. There was no use of a public highway and no basis for a charge for the use of the same. The charge was clearly for general revenue purposes.

However, as we have already stated, it is the position of the Commonwealth that the formula in the Pennsylvania statute is based on miles operated, and not on physical length of routes.

This formula has been applied and assessments made with consistency for the period of 22 years since the Act of June 22, 1931 became a law.

If the act should be construed as basing the apportionment on miles of routes, and not upon miles traveled, such a decision would change the formula which has been

applied and the assessments which have been made since the passage of the law of 1931.

Respectfully submitted,

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